

No. 83-206

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1983

CHARLES M. MILLER, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FEDERAL CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

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Petitioner contends that he is entitled to compensation for increased flooding of his land due to the operation of a dam.

1. In 1936 petitioner acquired a farm in Perry County, Arkansas, containing approximately 1,834 acres, most of which was situated within a meander bend of the Arkansas River. In the following decade, the erosive action of the river transformed the bend into an "oxbow" peninsula, and by 1950 the farm had been reduced to between one half and one third of its original size. Pet. App. A3-A4.

On July 24, 1946, Congress authorized a multiple purpose plan for improvement of the Arkansas River and its tributaries to provide a system to serve navigation and provide hydroelectric power, flood control, and recreation. Section 1 of the Rivers and Harbors Act, ch. 595, 60 Stat. 634, 635-636. This plan included the establishment in the

river of a fixed channel for navigation. As the river's erosion continued to constrict the peninsula, the Corps of Engineers became concerned about the possibility of a natural avulsion occurring at a location that would not conform to the planned navigation channel. Pet. App. A4. To prevent this, the Corps sought emergency funds, and in 1949 Congress appropriated funds for the construction of a cutoff in the proper location. Act of Oct. 13, 1949, ch. 688, 63 Stat. 845.

In April 1950, the United States purchased from petitioner a 248 acre strip of land across the base of the peninsula, and the Corps of Engineers constructed a narrow pilot channel through the center of that strip. As a result, the river began to deposit sediment in the original river bed, and, because the cutoff lowered the slope of the river, the original oxbow channel began to dry up. In 1952, the Corps of Engineers constructed two dikes at the upstream entrance of the original channel to block the water from entering and to increase the deposition in the oxbow, thereby preventing the new channel from migrating. During 1961-1963, after the new channel grew larger and the oxbow portion of the original river bed continued to fill in, the Corps of Engineers raised the level of the two dikes constructed in 1952 and constructed three new dikes at the upstream entrance of the original channel. The five dikes kept all but the extremely high flows out of the upstream end of the original oxbow channel. See Pet. App. A4-A5, A34.

On May 17, 1962, petitioner filed with the State of Arkansas an application for a deed conveying to him all the right, title, and interest of the State of Arkansas in the lands that had emerged from the abandoned oxbow channel of the Arkansas River. On September 26, 1962, the Commissioner of State Lands issued petitioner a deed to certain

lands that had emerged from the river bed. See Pet. 6. By 1964 petitioner was using a large portion of the emerged river bed lands for agricultural purposes.

On November 24, 1969, in furtherance of the plan approved by Congress in 1946, the Corps of Engineers closed the navigation dam. This activity caused water to enter the downstream end of the old oxbow channel, permanently occupying parts of the original river bed for the first time since the construction of the cutoff in 1950. In addition, for the first time since 1957, flooding occurred along the Arkansas River in 1973 and 1974. As a result, lands within the original river bed, which had been cleared and successfully farmed after the commencement of the construction of the navigation project, were subjected to flooding for the first time in 16 years.

2. In 1975, petitioner filed this action in the former Court of Claims seeking just compensation under the Fifth Amendment for the alleged taking of approximately 800 acres of his property resulting from the 1969 closing of the lock and dam, which caused water to overflow portions of his farm, rendering them unsuitable for cultivation. The government contended that the lands thus inundated had been part of the bed of the Arkansas River at the time the river improvement project was commenced, and had for the whole period of time required to complete the project remained subject to the dominant navigational servitude of the United States. The trial judge initially disagreed and ruled in favor of petitioner. Pet. App. A2-A24. The en banc Court of Claims vacated the decision of the trial judge and remanded the case for the determination of certain factual issues (*id.* at A25-A28).

On remand, the United States Claims Court¹ held that petitioner was not entitled to compensation (Pet. App. A30-A40). The court of appeals affirmed (*id.* at A1-A2). The courts concluded that the lands in dispute were a part of the former river bed as it existed prior to the construction of the 1950 cutoff and that the flooding of the land in 1969 "was necessary to the same navigation project which caused the initial emergence of the land" in 1950 (*id.* at A2, A38-A39). Accordingly, the courts concluded that the lands in question were subject to the navigational servitude of the United States and hence that any additional flooding could not constitute a taking.

3. Petitioner's contention that the court of appeals erred is based on a dispute over the facts of this case. Petitioner contends that the decision below "extend[s] the navigational servitude to land located *beyond* the river bank" (Pet. 10; emphasis added). But the Claims Court expressly found, based partly on a stipulation entered into by petitioner, that "all of the land in controversy is within the former riverbed" (Pet. App. A39). By the same token, petitioner argues (Pet. 11-14) that he is entitled to compensation because the flooding is not within the "scope of the [original] project" (see *United States v. Miller*, 317 U.S. 369 (1943)), *i.e.*, that there have been two separate takings. But the courts below expressly found that *Miller* was inapplicable here because of the factual conclusion that the flooding in 1969 was "necessary to the same navigation project which caused the initial emergence of the land" (Pet. App. A2). Accordingly, this case presents no legal issue warranting review by this Court, and there is no reason to review the factual findings

¹ Prior to the decision on remand the Court of Claims had been reorganized pursuant to the Federal Courts Improvement Act, Pub. L. No. 97-164, 96 Stat. 27.

made by both courts below. See, e.g., *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178 (1938).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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